Supreme Court, U.S.
F I L E D
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CLERK

No. 98-1729

In the
SUPREME COURT OF THE UNITED STATES

DANIEL M. McNEIL,

Petitioner,

v.

STATE OF UTAH, MEDICAID SECTION,

Respondent.

On Petition for a Writ of Certiorari to the Utah Supreme Court

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under one provision of the Social Security Act, applicants for Medicaid must assign to the State, as a precondition of Medicaid eligibility, all claims to medical benefits that may become payable to them by liable third parties. 42 U.S.C. § 1396k(a). Moreover, States are required by the Act to seek reimbursement of Medicaid outlays from those liable third parties. 42 U.S.C. § 1396a(a)(25)(A). A third provision, 42 U.S.C. § 1396p(a)(1), prohibits liens against the property of Medicaid recipients while they are alive for reimbursement of public medical assistance paid out on their behalf. Finally, another provision authorizes creation of a supplemental needs trust for a disabled person, the assets of which are not counted in determining an applicant's financial eligibility for Medicaid assistance. 42 U.S.C. § 1396p(d)(4).

In Utah, the mandated assignment by Medicaid applicants is governed by Utah Code Ann. § 26-19-4.5 (1995), and reimbursement from liable third parties is obtained via Utah Code Ann. § 26-19-5(1) (1995). Under this latter section, a claim assigned to the State by a Medicaid applicant is a lien against any medical benefits payable to that person by a liable third party.

1. Should this Court review the conclusion that---because the liened insurance proceeds are assets of the third party tortfeasor that are owed to the State as assignee, and **not** the property of Medicaid recipient McNeil---section 26-19-5(1) does not conflict with the federal anti-lien statute, 42 U.S.C. § 1396p(a)(1)?

2. Should this Court review the conclusion that Congress, in allowing creation of a supplemental needs trust under 42 U.S.C. § 1396p(d)(4), did not intend an exception to 42 U.S.C. § 1396a(a)(25)(A), which mandates State recovery of paid Medicaid assistance from any liable third party?

PARTIES TO THE PROCEEDING

Pursuant to Rule 24(1)(b), a list of all the parties to the proceeding in the court whose judgment is under review is set forth below. Only two of the parties in the original trial court proceeding, Daniel M. McNeil and the State of Utah's Medicaid Section, participated in the appeal to the Utah Supreme Court and are now before this Court.

David Spencer Wallace - Driver of the car in which McNeil was a passenger and the first-named co-plaintiff in the interpleader action.

Allstate Insurance Co. - Liability insurer of Wallace's vehicle and co-plaintiff in the interpleader action.

Estate of Nicole Jackson - Co-defendant in the interpleader action. Nicole Jackson was a passenger in the car driven by Wallace and was killed in the accident.

Daniel M. McNeil - Co-defendant in the interpleader case, cross-claim defendant below, appellant before the Utah Supreme Court, and Petitioner before this Court.

State of Utah, Medicaid Section - Co-defendant in the interpleader case and cross-claimant against Daniel M. McNeil to collect reimbursement of a Medicaid claim from personal injury proceeds payable to Daniel McNeil.

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JURISDICTION

Petitioner, Daniel M. McNeil, seeks certiorari review of the Utah Supreme Court's final judgment in *Wallace v. Estate of Jackson*, 972 P.2d 446 (Utah 1998), included here as Appendix A. This Court's jurisdiction is provided by 28 U.S.C. § 1257(a) (1993), insofar as the State's highest court upheld a state statute challenged as in conflict with various provisions of the federal Social Security Act.

RELEVANT STATUTES

The text of the following statutes is reprinted in Appendix B: 28 U.S.C. § 1257(a); 42 U.S.C. § 1396a(a)(25)(A); 42 U.S.C. § 1396k(a); 42 U.S.C. § 1396p(a)(1); 42 U.S.C. § 1396p(d)(4); Utah Code Ann. § 26-19-4.5 (1995); Utah Code Ann. § 26-19-5(1) (1995).

STATEMENT OF THE CASE

The following facts on which summary judgment was awarded to the State of Utah in this case are taken from the opinion below, Appendix A.

Daniel M. McNeil, a teenaged minor, was severely injured in an accident in October 1994. He was a passenger in a car that struck several cows on the road. Ten months earlier, McNeil's grandmother and legal guardian had applied for financial and medical assistance for him. As a mandated precondition to McNeil's eligibility for Medicaid, she had assigned to the State of Utah his rights against any third parties liable for his medical expenses. Such an assignment is required by Utah Code Ann. § 26-19-4.5 (1995). After the

accident, the Utah Medicaid program paid out approximately $43,000 for McNeil's medical bills.

The driver's and cow owner's insurance policy limits were insufficient to satisfy all the claims of persons injured or killed in the accident. Thus, insurer Allstate Insurance Company filed an interpleader action so all parties could present their claims and the trial court could direct proper payment from the available insurance proceeds. The State of Utah, which had previously notified Allstate of its assignment from McNeil, was named as a defendant in the interpleader action, as was McNeil. The State cross-claimed against McNeil, asserting its lien under Utah Code Ann. § 26-19-5(1) (1995) against $43,000 of the proceeds payable to him by Allstate. McNeil counterclaimed against the State, contending that the State's lien was invalid under federal law.

Allstate eventually settled with all the parties, and McNeil's allotment of the available insurance proceeds was set at $85,000. The trial court concluded the State was entitled to reimbursement from the proceeds and awarded the State of Utah $43,000 of that amount. The remainder was placed in a "supplemental needs trust" for McNeil.

On appeal, McNeil first contended that federal law, 42 U.S.C. § 1396p(a)(1), prohibits the State from asserting a lien or seeking recovery against him for the $43,000 in Medicaid benefits paid on his behalf. This subsection provides: "No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf, except . . . [under circumstances not applicable here]."

The Utah Supreme Court rejected this argument, concluding there was no conflict with federal law because the liened insurance proceeds are the property of the third party tortfeasor that are owed to the State as assignee of McNeil's claim. *Wallace*, 972 P.2d at 448.

Next, McNeil claimed that Congress, in enacting the supplemental needs trust provision, 42 U.S.C. § 1396p(d)(4), intended in 1993 to exempt tort settlements from 42 U.S.C. § 1396a(a)(25)(A), which mandates reimbursement of Medicaid assistance from a liable third party, until after the death of the disabled tort victim. The Utah Supreme Court likewise rejected this argument, 972 P.2d at 448, relying on its conclusion in a companion case that there is no irreconcilable conflict between the two federal provisions or between federal and state law:

> [T]he Medicaid recovery statutes deal with reimbursement, while the discretionary trust statutes address Medicaid eligibility. Thus, we may conclude, without doing violence to either statute, that recoveries from third parties liable for the same expenses covered by Medicaid belong to the State, but any remaining balance not owed to the State may be used to fund a properly structured supplemental needs trust.

S.S. v. State of Utah, 972 P.2d 439, 443 (Utah 1998) (included here as Appendix C).

SUMMARY OF ARGUMENT

Because the Medicaid program is designed as the payor of last resort for the costs of medical care, States are required by federal law to collect from liable third parties reimbursement for Medicaid benefits paid out on behalf of Medicaid recipients. 42 U.S.C. § 1396k(a). Petitioner argues that Congress intended to exempt him---a disabled tort victim who obtains a settlement from the tortfeasor---from the mandatory reimbursement provision by enacting either the anti-lien provision, 42 U.S.C. § 1396p(a)(1), or the supplemental needs trust provision, 42 U.S.C. § 1396p(d)(4).

Neither argument has any support in the statutory provisions themselves, in their legislative history, or in case law interpreting the Social Security Act. More importantly, both statutory arguments must fail in light of the Utah Supreme Court's conclusion---essentially ignored by Petitioner McNeil---that the portion of the insurance settlement equal to the amount paid out by the Medicaid program (in this case, $43,000) is not McNeil's property. Instead, because of the mandatory assignment of his claim to the State as a precondition of Medicaid eligibility, those settlement proceeds are the property of the liable third party that must be paid to the State as assignee.

REASONS FOR DENYING THE PETITION

I. THE UTAH SUPREME COURT CORRECTLY HARMONIZED THE PROVISIONS OF THE SOCIAL SECURITY ACT.

The Utah Medicaid reimbursement statutes do not conflict with federal law but were, in fact, enacted to comply with federal mandates in order to qualify for Medicaid funds.

A State that participates in the Medicaid program must take all reasonable measures to ascertain the legal liability of third parties to pay for the care and services available under the program, including the collection of information to enable the State to pursue claims against third parties and the submission of a plan for pursuing claims against such third parties. 42 U.S.C. § 1396a(a)(25)(A). The State must seek reimbursement for the medical assistance paid out, to the extent of such legal liability, if the amount it can reasonably expect to recover exceeds the costs of the recovery. 42 U.S.C. § 1396a(a)(25)(B).

The participating State must also require that, as a condition of eligibility for Medicaid, the individual assign to the State any right to payment for medical care from any liable third party. 42 U.S.C. § 1396k(1)(a). Upon collection of any claim, the State must retain any amount collected to reimburse it for medical assistance payments made on behalf of the individual and then pay the remainder to the individual. 42 U.S.C. § 1396k(1)(b).

In order to comply with this federal mandate, the Utah Legislature enacted the Utah Medical Benefits Recovery Act,

Utah Code Ann. §§ 26-19-1 to -18 (1995) (amended 1998), which creates a statutory plan to collect Medicaid claims. In accordance with the federal mandate, payments from a third party otherwise payable to or on behalf of a Medicaid recipient are deemed to be assigned to the Utah Department of Health if it has provided medical assistance. Utah Code Ann. § 26-19-4.5(1) (1995).

Here, the Utah Supreme Court recognized that "[A]s a condition to receiving Medicaid assistance, McNeil's legal guardian assigned to the State that portion of any third-party recovery equal to the amount of Medicaid assistance which may be rendered him." 972 P.2d at 448. Due to this assignment, the Department of Health may submit its claim for payment of benefits directly to the third party. Utah Code Ann. § 26-19-4.5(1) (1995).

To facilitate collection, Medicaid's assigned claim to reimbursement for medical assistance paid out is a lien against any proceeds payable to the recipient by a third party liable for the recipient's medical expenses. Utah Code Ann. § 26-19-5(1)(b) (1995). This lien has priority over all other claims to the proceeds, including the recipient's claim, except for statutorily authorized attorney's fees and costs. Utah Code Ann. § 26-19-5(1)(b) (1995).

Because the State's reimbursement claim has priority over other claims, a lien is placed on proceeds payable from the third party in order to safeguard its priority. This lien prevents the recipient from taking any pre-emptive action that would impair the State's ability to collect on its assigned claim to third party payments that are in settlement or are

already in the hands of the Medicaid recipient. *S.S. v. State of Utah*, 972 P.2d 439, 442 (Utah 1998).

In rejecting Petitioner's arguments concerning the anti-lien and supplemental needs trust provisions, the Utah Supreme Court merely harmonized the various provisions of the Social Security Act in light of its objectives and underlying policies. *Wallace*, 972 P.2d at 448. This is precisely the mode of statutory analysis dictated by this Court. *E.g.*, *National Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (" 'When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature . . . .' ") (quoting *Brown v. Duchesne*, 19 How. 183, 194, 15 L.Ed. 595 (1857)). Any doubt or uncertainty as to the meaning or application of a statute requires the court to analyze the act in its entirety in order to harmonize the provision in light of the act's objective. *Kokoszka*, 417 U.S. at 650.

Petitioner's strained interpretation of the several federal provisions, however, would gut the mandatory reimbursement provision based on imagined Congressional "intent" that is evidenced nowhere. No court has yet accepted such a twisted interpretation of the Social Security Act, and this Court should decline Petitioner's invitation to be the first.

II. BY ALLOWING THE STATE TO LIEN THE PROPERTY OF A LIABLE THIRD PARTY TO SATISFY ITS ASSIGNED CLAIM, UTAH LAW COMPLIES WITH FEDERAL LAW.

Petitioner mistakenly asserts that the Utah Supreme Court upheld a state law that allows a Medicaid lien on a living Medicaid recipient's property. The court actually held that the Medicaid lien is placed on the liable third party's property, not property of the Medicaid recipient; therefore, it does not violate federal law. *Wallace*, 972 P.2d at 448.

Petitioner seeks to exempt himself from the federal law's mandated reimbursement of Medicaid from the proceeds of his insurance settlement, while ignoring the legal effect of his prior assignment to the State of his claim against the liable third party. The fatal flaw in Petitioner's reasoning concerning both the anti-lien provision and the supplemental needs trust provision is his failure to acknowledge that, due to his assignment to the State of any claims against a liable third party for his medical costs, that portion of the insurance settlement proceeds is not his property. It is property of the liable third party that must be paid over to the State as assignee, *Wallace*, 972 P.2d at 448.[1]

The Utah Supreme Court reached the same conclusion in the companion case of *S.S. v. State of Utah*, issued the same day, which in turn relied on a recent New

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1. Property interests are matters of state law creation and definition. *See Butner v. United States*, 440 U.S. 48, 55 (1979).

York decision, *Cricchio v. Pennisi*, 683 N.E.2d 301 (N.Y. 1997).

In light of the state court's ruling that Petitioner lacks a property interest in $43,000 of the insurance settlement proceeds, there can be no conflict with the federal provisions that Petitioner contends protect "his" settlement proceeds. Thus, the petition presents no substantial question of important federal law requiring resolution by this Court.

III. THERE IS NO CONFLICT AMONG COURTS ON THE FIRST QUESTION PRESENTED.

Petitioner correctly asserts that several jurisdictions other than Utah have reached the same conclusion as the Utah Supreme Court here, i.e., that a State's claim on proceeds payable for the medical expenses of a Medicaid recipient does not violate 42 U.S.C. § 1396p(a)(1), the federal provision barring Medicaid liens on a living recipient's property. *E.g.*, *Cricchio*; *Norwest Bank of North Dakota, N.A. v. Doth*, 159 F.3d 328 (8th Cir. 1998).[2]

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2. *See also Sullivan v. County of Suffolk*, No. 98-7816, 1999 WL 235979 (2d Cir. April 23, 1999); *Florida Agency for Health Care Admin. v. Eastbrook*, 711 So.2d 161 (Fla. Dist. Ct. App. 1998); *Estate of Calhoun*, 684 N.E.2d 842 (Ill. App. Ct. 1997); *Payne v. North Carolina Dep't of Human Resources*, 486 S.E. 469 (N.C. Ct. App. 1997); *Waldman v. Candia*, 722 A.2d 581 (N.J. Super. Ct. App. Div. 1999); *Cuello v. Valley Farm Workers Clinic, Inc.*, 957 P.2d 1258 (Wash. Ct. App. 1998). A number of cases, though not deciding the validity of a lien per se, have held that Medicaid has a valid priority claim for full reimbursement out of the

On the other hand, Petitioner erroneously asserts there is a conflict among courts on the anti-lien provision issue. Petition for Certiorari at 17. The authorities cited by Petitioner as "upholding the anti-lien provisions" are easily distinguished from this case and lend no support to his claim of inconsistency among the federal and state courts.

First, Petitioner relies upon a number of Medicaid estate recovery cases that do not concern third party liability proceeds at all. For example, *Connecticut v. Murtha*, 427 A.2d 807 (Conn. 1980), involved a State Medicaid lien on a Medicaid recipient's interest as a legatee in her deceased sister's estate. In *Citizens Action League v. Kizer*, 887 F.2d 1003 (9th Cir. 1989), the dispute involved recovery against the estate of a deceased Medicaid recipient and the definition of "estate." The issue in *Dalzin v. Belshe*, 993 F. Supp. 732 (N.D. Cal. 1998), also involved State Medicaid recovery from a deceased recipient's estate, which was divided between disabled and nondisabled children. In all three of these cases, the issue addressed involved recovery from a Medicaid recipient's estate or property, not, as here, reimbursement of Medicaid from the property of a third party legally liable for the recipient's medical expenses.

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personal injury proceeds payable to the Medicaid recipient. *Walker v. District of Columbia*, 682 A.2d 639 (D.C. 1996); *Davis v. Idaho Dep't of Health & Welfare*, 943 P.2d 59 (Idaho Ct. App. 1997); *Roberts v. Total Health Care, Inc.*, 709 A.2d 142 (Md. 1998); *Whelan v. Division of Med. Assistance*, 694 N.E.2d 10 (Mass. App. Ct. 1998); *Grayam v. Department of Health & Human Resources*, 498 S.E.2d 12 (W.Va. 1997); *Cargill v. Wyoming Dep't of Health*, 967 P.2d 999 (Wyo. 1998).

Another case cited by the Petitioner, *Moore v. Nassau County Dep't of Public Transp.*, 357 N.Y.S.2d 652 (N.Y. Sup. Ct. 1974), actually supports the State's position. The court held that, notwithstanding the overall prohibition on Medicaid liens against the recipient, Medicaid may still seek reimbursement from liable third parties. The court held that the Medicaid agency was entitled to a lien for the medical assistance it provided for injuries directly related to the accident for which the third party was responsible. *Id.* at 658. Any other claims for medical assistance were not allowed. *Id.*

Petitioner also relies on *White v. Sutherland*, 585 P.2d 331 (N.M. Ct. App. 1978), which does not even address the issue of a Medicaid lien. The New Mexico Medicaid agency asserted a claim for full reimbursement based on a state statute granting it a subrogated right for recovery of medical expenses. The court held that the agency's right of repayment depends on application of equitable principles of subrogation and that the statute did not provide that the agency must obtain full reimbursement from the legally liable third party . *Id.* at 335.

The cases Petitioner relies on to show inconsistent treatment of the first question presented in this case are simply not on point. Petitioner's claim that the case law is in conflict, requiring decisive resolution by this Court on certiorari review, is illusory.

IV. THE DECISION BELOW IS CONSISTENT WITH LEGISLATIVE HISTORY AND THE POLICY OF ALLOWING MEDICAID RECIPIENTS TO ESTABLISH SUPPLEMENTAL NEEDS TRUSTS.

Finally, Petitioner asserts that certiorari review is needed because the result reached by the Utah Supreme Court jeopardizes a Medicaid recipient's ability to establish a supplemental needs trust. Petitioner alleges that Section 1396p(d) unambiguously allows a Medicaid recipient to establish a supplemental needs trust with personal injury settlement proceeds and to protect the entire tort settlement by deferring Medicaid reimbursement until after the recipient's death. Petition for Certiorari at 26-27. This view, however, is not supported by the supplemental needs trust provision itself or by its legislative history.

Section 1396p was first created in 1982 with Congress's enactment of the Tax, Equity, & Fiscal Responsibility Act. It was intended "to assure that all of the resources available to an institutionalized individual, including equity in a home, which are not needed for the support of a spouse or dependent children will be used to defray the costs of supporting the individual in the institution." Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 1982 U.S.C.C.A.N. (96 Stat. 324) 814. It also sought to "balance government's legitimate desire to recover its Medicaid costs against an individual's need to have the home available in the event discharge from the institution becomes feasible." *Id.* Thus, the provision was intended to help the government collect reimbursement for Medicaid payments. This goal is completely consistent with

the placement of liens by the State, as assignee, on a liable third party's property.

In 1993, Congress substantially amended Section 1396p in the Omnibus Budget Reconciliation Act (OBRA). OBRA amended the federal Medicaid statute to authorize the formation of "supplemental needs trusts" solely for the benefit of disabled individuals under age 65. The trust assets are deemed unavailable for the purpose of determining Medicaid eligibility; if they were not deemed unavailable, the trust assets would render the disabled person financially ineligible for Medicaid assistance. Accordingly, the amendment created an exception to the rules set out in 42 U.S.C. §1396p(d) that limit eligibility for medical assistance payments based on certain trust arrangements.

In short, although it authorized supplemental needs trusts, OBRA did not alter the requirement under federal law that every Medicaid applicant assign to the state his right to payment for medical costs from any third party, including payment from personal injury settlement proceeds.

The amendment authorizing Medicaid eligibility for an individual who is the beneficiary of a supplemental needs trust was intended to address the recipient's need for assistance in paying for expenses not covered by Medicaid. However, in the legislative history, it was assured that "in any case where a third party has a legal liability to make payment for services provided to a Medicaid beneficiary, a State is subrogated to the right of any other party to payment for such services to the extent that payment has been made by the Medicaid program." Omnibus Budget Reconciliation Act

of 1993, Pub. L. No. 103-66, 1993 U.S.C.C.A.N. (107 Stat. 312) 537.

As New York's highest court has explained, "[T]here is no indication that the amendments were designed to alter the legal liability of any responsible third party to reimburse Medicaid for care, which is a cornerstone of the Medicaid program." *Cricchio*, 683 N.E.2d at 308. Petitioner has demonstrated no basis for judicial disturbance of this statutory cornerstone.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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APPENDIX A

David Spencer WALLACE and Allstate Insurance Company, Plaintiffs,

v.

ESTATE OF Nichole JACKSON, Daniel McNeil, Emily Nelson, Keejoe Attakai, State of Utah Medicaid Section, and John Does I-XX, Defendants.

State of Utah, Medicaid Section, Cross-Claimant and Counterclaim Defendant,

v.

Daniel M. McNeil, Cross-Claim Defendant and Counterclaimant.

No. 960028.

Supreme Court of Utah.

Nov. 27, 1998.

Rehearing Denied Jan. 29, 1999.

Automobile insurer filed interpleader action to divide proceeds of insurance policy among accident victims. State cross-claimed against Medicaid recipient pursuant to his assignment of third-party payments. The First District Court, Box Elder County, Ben H. Hadfield, J., awarded State $43,000 of recipient's $85,000 share of insurance proceeds, and recipient appealed. The Supreme Court, Howe, C.J., held that: (1) anti-lien statute in Social Security Act, which

bars State liens for medical assistance on property of recipient prior to his death, was not violated when State sought reimbursement in interpleader action brought by tortfeasor's insurer; (2) repayment of Medicaid lien from third-party settlement funds had to precede creation of supplemental needs trust for recipient; and (3) imposition of lien did not result in taking of property without due process of law.

Affirmed.

Durham, Associate Chief Justice, filed dissenting opinion, in which Stewart, J., joined.

State imposition of lien against Medicaid recipient's personal injury settlement proceeds was not taking of property without due process of law, as lien was imposed pursuant to assignment executed as condition of receiving Medicaid assistance; even assuming limited property interest in funds, recipient was afforded opportunity to be heard concerning award of part of settlement proceeds to state. U.S.C.A. Const. Amend. 14; Social Security Act, § 1917(a)(1), as amended, 42 U.S.C.A. § 1396p(a)(1); U.C.A.1953, 26-19-5(1).

Jan Graham, Att'y Gen., Linda Luinstra, Asst. Att'y Gen., Salt Lake City, for the State

Robert B. Sykes, Matthew H,. Raty, Salt Lake City, for McNeil

HOWE, Chief Justice:

Daniel M. McNeil appeals from a summary judgment granted by the district court enforcing the State's lien against insurance proceeds he recovered as a result of an automobile accident in which he was injured. The court also awarded the State attorney fees and costs.

McNeil was a passenger in an automobile which was involved in an accident. He sustained severe brain injuries with permanent effects and profound neurological deficits. At the time of the accident, he was sixteen years of age and resided with his seventy-six-year-old grandmother and legal guardian, Lilian McNeil, who had raised him from infancy. She was a recipient of social security benefits, and McNeil was eligible for Medicaid assistance. As a condition to receiving Medicaid benefits, the guardian, pursuant to Utah Code Ann. § 26-19-4.5, assigned to the State McNeil's rights against third parties liable for his medical expenses.

The persons liable for McNeil's injuries were insured by Allstate Insurance company, but the insurance proceeds were insufficient to satisfy all the potential claims of person injured or killed in the accident. Therefore, Allstate filed this interpleader action requiring all persons involved in the accident to present their claims at one time so the court could divide the limited proceeds. Prior to Allstate's filing this interpleader action, the State had given Allstate notice of its assignment from McNeil. The interpleader action named the State and McNeil as defendants, and the State cross-claimed against McNeil to recover the part of the proceeds payable to him by Allstate. The State did not make a claim directly against Allstate. Subsequently, Allstate settled with all

parties, and McNeil received $85,000. The district court awarded the State $43,000 of that amount for reimbursement of medical expenses it had paid on McNeil's behalf through the Medicaid program. The court then placed the remainder in a special needs trust for McNeil. He appeals.

[1] McNeil first contends that 42 U.S.C. § 1396p(a)(1) prohibits the State from asserting a lien or seeking recovery against him for Medicaid benefits paid on his behalf. That subsection provides:

> (1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except ... [exceptions not relevant to this case].

He asserts that Utah Code Ann. § 26-19-5(1) violates the foregoing federal statute wherein section 26-19-5(1) provides that the State's claim to recover for medical assistance furnished shall be a lien against any proceeds payable to the recipient by a third party. McNeil argues that the State may seek reimbursement directly from a third party who is legally liable for the medical assistance, but the State may not proceed as it did in the instant case against the recipient. In so doing, McNeil argues that the State has violated 42 U.S.C. § 1396p(a)(1).

There is no merit to this contention. In a companion case which we have decided today, S.S. v. State, 972 P.2d 439 (Utah 1998), we held that payments made by a third party do not legally become the property of the recipient until after a valid settlement which must include reimbursement to the

State for Medicaid benefits. In that case, we relied upon a decision of the New York Court of Appeals in the consolidated appeals of Cricchio v. Pennisi and Link v. Town of Smithtown, 90 N.Y.2d 296, 683 N.E.2d 301, 660 N.Y.S.2d 679 (1997). There, the court stated that as a consequence of the mandatory assignment,

> the settlement proceeds are resources of the third party tortfeasor that are owed to [the state recovery office]. Accordingly, the lien on the settlement proceeds attaches to the property of the third party, and thus does not violate the statutory prohibition against imposing a lien against a beneficiary's property until after his or her death. The flaw in plaintiff[s'] theory that the lien cannot be satisfied until the recipient's death is that it fails to appreciate this critical distinction between the assets of a responsible third party and assets belonging to the Medicaid recipient.

660 N.Y.S.2d 679, 683 N.E.2d at 305 (citations omitted).

[2][3] In enacting 42 U.S.C. § 1396--the anti-lien statute--Congress could not have intended to prohibit or inhibit third-party recoveries which it directed in the same Social Security Act. Once the assignment has been made, it does not matter whether the State proceeds directly against the third-party tortfeasor or whether the State simply seeks its share of the insurance proceeds paid into court in an interpleader action such as occurred in the instant case.

As part of the Social Security Act, 42 U.S.C. § 1396p(a)(1) has coexisted for many years with 42 U.S.C. § 1396a(a)(25)(A), a sister section in the Act, which mandates states to seek reimbursement from third parties who are legally liable for the medical payments. It is a familiar principle of statutory construction that sections of a statute should be harmonized wherever possible to avoid any conflict between them. Here, if that part of the insurance proceeds assigned by McNeil's guardian to the state are considered to not be McNeil's property, harmony is achieved. Thus the federal anti-lien statute is not violated when the State seeks reimbursement in an interpleader action. As stated in the State's brief:

> Placing a lien against third party settlement proceeds does not result in a "lien against the property of an individual prior to his death on account of medical assistance paid or to be paid on his behalf" because third party settlement proceeds have been specified by the recipient as belonging to the State Medicaid Agency as a precondition of the recipient's eligibility.

[4][5] McNeil next contends that both federal and state statutes explicitly allow a personal injury victim to put proceeds from a personal injury settlement into a special needs trust and thereby avoid any claim by the State for Medicaid reimbursement. This same issue was raised in S.S. v. State. There we held that repayment of the Medicaid lien from third-party settlement funds must precede the creation of the supplemental needs trust. That holding is controlling here; once the trust is created, the State cannot make any demand upon it during McNeil's lifetime.

[6] Lastly, McNeil contends that the State-imposed lien against his personal injury settlement proceeds constitutes a taking of his property without due process of law in violation of both the United States and Utah Constitutions. He argues that he has a property interest in his right to recover for personal injuries, and the State may not lien or take this property without affording him procedural due process or, in other words, a notice and a hearing. We again find no merit in this contention. As a condition to receiving Medicaid assistance, McNeil's legal guardian assigned to the State that portion of any third-party recovery equal to the amount of Medicaid assistance which may be rendered him. Even if we were to assume that McNeil does have a limited property interest in the funds which were assigned, his constitutional rights were not violated by the State. He was afforded the opportunity to be heard in the district court concerning the award of part of the settlement proceeds to the State. He has now been afforded an appeal to this court. In both courts, his arguments have been asserted and both courts have ruled against him. He has been accorded full due process even though his contentions have been rejected by both courts.

Judgment affirmed.

Justice ZIMMERMAN and Justice RUSSON concur in Chief Justice HOWE's opinion.

DURHAM, Associate Chief Justice, dissenting:

I respectfully dissent in this case as well as in today's companion case, S.S. v. State.

McNeil, the appellant in this case, asserts that state statutes allowing the State to file liens against a Medical recipient for money received from third parties in personal injury suits directly contradict provisions of federal Medicaid law. Therefore, McNeil argues, the federal statutes preempt the state statutes, making the lien against McNeil invalid and requiring summary judgment in McNeil's favor. The majority holds that no such contradiction exists and that no cause for preemption has been raised. I disagree. I would hold that our state statutes do contradict provisions of federal Medicaid law and that federal law controls.

The Utah Code chapter on Medicaid specifically prevents application of any part of the chapter in a manner contrary to federal law. See Utah Code Ann. § 26-19-17. The Utah Code does provide for the State to recover, through a lien on recipients' property, any payments from liable third parties made to Medicaid recipients. Utah Code Ann. §§ 26-19-5(1) & -7(1)(b). The federal law, however, states clearly that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except" when the benefits were incorrectly paid or the property is the real property of specified individuals. 42 U.S.C. § 1396p (a)(1). Furthermore, '[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the state plan may be made, except" in the situations described above or when the recipient is over 65 and meets certain requirements. 42 U.S.C. § 1396p(b)(1). Both parties agree that the exceptions in these sections do not apply to McNeil and that the State has in fact acquired a lien. Thus, the federal statute conflicts with the state statute and prohibits the State's actions in this case.

The majority, absent any analysis or justification, holds that "by viewing that part of the insurance proceeds which have been assigned by McNiel's guardian to the State as not the property of McNeil" it may allow the State to reach what is in actuality McNeil's property. Federal law expressly prohibits liens being imposed against the property of individuals in McNeil's situation. See 42 U.S.C. § 1396p(a). The majority achieves an "end run" around this prohibition through what seems to me the illogical conclusion that the proceeds in dispute are not really McNeil's property, but perhaps his grandmother's or even the State's. The language of section 1396p clearly states "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid." 42 U.S.C. § 1396p(a) (emphasis added). Because the statute expressly applies to any property, the majority's result arbitrarily deprives McNeil of his property. See generally State v. Murtha, 179 Conn. 463, 427 A.2d 807, 810 (Conn.1980) (holding that "the design of the statute is to prohibit ... efforts by states to recoup from beneficiaries ... amounts paid for medical assistance to those beneficiaries during their lifetimes").

As indicated above, all Medicaid recipients must, as a condition of eligibility,

> assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such right, ... to payment for medical care from any third party.

42 U.S.C. § 1396k(a)(1)(A).

McNeil's grandmother did assign McNeil's right to third-party payments to Medicaid, but the assignment was not exclusive, as evidenced by Medicaid's willingness to allow recipients to pursue third-party recovery actions independently, provided they notify Medicaid first. In other words, McNeil still retained the right to sue for and receive third-party payments, notwithstanding the State's collateral interest in recovering Medicaid benefits. See Utah Code Ann. § 26-19-7. Moreover, McNeil's injuries in this case--including pain and suffering and lost wages--exceeded the amount Medicaid paid on his behalf for medical care alone. Had Medicaid decided not to sue because the costs of recovery would exceed the recovery itself, see Utah Code Ann. § 26-19-5(4), McNeil could, nevertheless, have pursued the third party for his damages. Thus, both the State and McNeil had causes of action against Allstate. The State did not pursue its claim, however. The settlement made by all liable parties gave McNeil $85,000, and the State cross-claimed only against McNeil for reimbursement. The procedural posture of this case thus illustrates clearly that the State seeks to enforce its lien against McNeil and his property--the settlement amount. The majority's holding that the lien is against its "own property" is unrealistic. The State sought recovery from McNeil directly, possibly to save itself the expense of litigation with Allstate. [FN1] Although protecting public money is an admirable goal, the State should not be allowed to pursue it at the expense of persons Congress sought to protect in creating prohibition against liens of this kind.

FN1. The recipient must pay all of the State's litigation expenses incurred from fighting with the recipient if the agency wins. Utah Code Ann. § 26-19-7(2). The State must bear its own expenses when litigating with a third party.

The State argued (and the majority apparently agrees) that the above interpretation makes the third-party liability recovery portions of the statute "meaningless," and urges us to read the statute to allow liens against personal injury recoveries. The underlying assignment relied on by the State, viewed in isolation, gives Medicaid the right to make a claim either against third parties for such money or against the recipient once he receives the money. However, "a statute should not be construed in a piecemeal fashion but as a comprehensive whole." Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991). Therefore, because another section of the Medicaid statute prohibits not only liens against Medicaid recipients but also any recovery for medical assistance correctly paid, see 42 U.S.C. § 1396p, the proper conclusion is that the State can enforce the assignment only by instituting claims directly against the liable third parties.

Other parts of the federal statute make the intent of Congress clear. The federal government requires states to

> (A) ... take all reasonable measures to ascertain the legal liability of third parties ... to pay for care and services available under the plan, including--
> (I) the collection of sufficient information ... to enable the State to pursue claims against such third parties,...
> (B) ... in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual ... the State ... will seek reimbursement for such assistance to the extent of such legal liability.

42 U.S.C. § 1396a(a)(25) (emphasis added).

It is true, as the State argues, that these statutes reflect the legislative intent that Medicaid should recover its health care expenditures where third parties caused a Medicaid recipient to incur them. However, the language of various sections of the statute indicates that Congress anticipated that third-party recovery would come directly from the third parties and not from the recipient. The language in section 1396a(a)(25) states plainly that states should pursue their third-party liability claims against the third parties themselves. See 42 U.S.C. § 1396a(a)(25). It does not mention recovery from the Medicaid recipient. The Utah statute, on the other hand, allows the department "to recover medical assistance provided as a result of the injury, disease, or disability" directly from the Medicaid recipient through a lien. Utah Code Ann. § 26-19-5(1) & -7(2). Congress plainly did not intend to authorize this method of collection.

Congress's understanding of a Medicaid recipient's plight could rationally have led it to require Medicaid agencies to proceed against the third party and not against the recipient. People receive Medicaid assistance when they have no other resources to pay for medical care. Requiring such persons to defend against liens is inconsistent with the entire benefit system created by the federal statutes. Congress had good reason to prohibit liens against recipients and to require the agencies to go after the liable third parties directly, thereby possibly reducing the injured party's burden. [FN2]

FN2. When an agency collects more than it has expended on an individual, it must reimburse that individual for the remainder. 42 U.S.C. § 1396k(b).

Moreover, the Department of Health and Human Services has made all state Medicaid directors aware that liens are only appropriate against the third party's property prior to an award to the injured party and are forbidden against a recipient's property.

> Section 1917(a)[42 U.S.C. § 1396p(a)] precludes states from placing liens on an individual's property. However, because a potential personal injury settlement is not yet the plaintiff's property, it can be subject to a TPL [Third Party Liability] lien ... To avoid the lien issue, but protect its rights, a state could ... intervene in the case and represent its own interests directly. Since the individual has assigned to the state his or her rights to recover payment for medical care under section 1912, the state has an interest which it can represent directly. [[FN3]]
>
> FN3. This memorandum also suggests that if the court places proceeds in a trust, the proceeds belong to the trust and not the individual, and thus a state can lien the trust. Id. However, the memorandum goes on to say that such liens will not work against special needs trusts, such as the one created for McNeil by the district court. Id. at 3-5; 42 U.S.C. § 1396p(d)(4). Thus the State may not exercise this option in this case.

Memorandum from Sally K. Richardson, Director of the Medicaid Bureau to all state Medicaid directors (June 5, 1996), at 3 (emphasis added). A lien on a "potential personal injury settlement" most logically means on the insurance proceeds themselves, or on the assets of the third party. [FN4] The Richardson memo does not contain the option of placing a lien on the recipient's recovery after the recipient

has proven liability and thus established a legal claim to the specific fund, as the State did in this case. The State chose to wait until legal ownership of the property transferred to McNeil before attempting to enforce its claim. That the money is not in McNeil's physical possession does not matter; it is McNeil's money. The State should not be permitted to proceed in this manner given the federal statute's prohibition on liens against recipients' property.

> FN4. The New York Court of appeals has read this phrase to include the type of lien placed in this case, but that reading is forced in light of the statutes. See Cricchio v. Pennisi, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301 (N.Y.1997).

The Medicaid statute further confirms this interpretation in part C of the assignment section, which mandates recipients to "cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable." 42 U.S.C. § 1396k(a)(1)(C) (emphasis added). Although this part specifically addresses the duties of a Medicaid recipient, the underlined language indicates that Congress expected the states to sue the third parties directly rather than waiting for the recipient to collect and then suing him.

Furthermore, the State's own Medicaid manual requires that States "seek recovery from the third party whenever a claim or claims have been paid for which a third party is liable. (See § 3904.3)." State Medicaid Manual, HCFA Pub. 45-3, § 3902, Transmittal No. 53 (May 1991) (emphasis added). Similarly, another provision states that "[a]n agency must seek reimbursement from a liable third party on all claims for which it determines that the amount it reasonably expects to

recover will be greater than the costs of recovery." 42 C.F.R. § 433.140(f)(1). The State has failed to do so in this case.

The State relies on certain letters from the director of the Medicaid Bureau recognizing the tension in the statutes and responding with the conclusion that opening the assignment of payments makes any of the recipient's proceeds from a personal injury case actually the property of Medicaid. See Letter from Sally K. Richardson, Director Medicaid Bureau, to Sonia Crannage, Sinnreich & Crannage Attorneys at Law (December 20, 1993); Letter from Sally K. Richardson, Director Medicaid Bureau, to Howard K. Gibbs, Assistant General Counsel, Human Resources Administration (December 20, 1993). These communications were apparently drafted without the benefit of any public hearing, and they do not represent an official agency determination on the matter. Therefore, we should not afford them any particular deference. Furthermore, even if they represented official positions, a proper reading of the federal statutes would require us to reject their rationale. See, e.g., Williams v. Mountain States Tel. & Tel. Co., 763 P.2d 796, 799 (Utah 1988) (reversing agency decision that directly contradicts statutory language).

Another aspect of the statutory scheme that supports this reading of the statute is the incentive the federal government gives to the states when they successfully collect third-party liability money: for any successful collection, the federal government returns fifteen percent of the money recovered on its behalf to the collecting agency as an "incentive payment [] for enforcement and collection." 42 U.S.C. § 1396b(p). This incentive scheme implicitly assumes that the state will incur costs in recovering third-party payments and

that the incentives will help to offset such costs. When the State places a lien on money already received by Medicaid recipients, it basically seeks a "free ride"; the recipient bears all of the investigation and litigation costs, and the State has to pay only for the lien. Additionally, if the recipient challenges the lien and loses, the recipient must also pay the State's attorney fees and costs under Utah law. Allowing the State to operate in this manner, and then collect attorney fees and the federal incentive fee, results in a windfall for the State from the pockets of injured and needy parties. Congress could hardly have intended such a result, especially in light of language elsewhere in the statute.

The State bases its cross-claim against McNeil on Utah Code Ann. §§ 26-19-5(1) & -7(2). Because these sections directly contradict federal law, 42 U.S.C. § 1396p(a), the State's liens should be declared illegal under Utah Code Ann. § 26-19-17. Therefore, I would reverse the district court's grant of summary judgment in favor of the State and grant summary judgment to McNeil. The State's lien is unenforceable. [FN5]

> FN5. The briefs also raised the important issue of whether the State has a priority lien against the third party and thus recovers 100% of its expenses before anyone else collects anything, or whether it can recover an amount proportional to the expenses of the other claimants. We obviously do not reach this issue in this case.

Justice STEWART concurs in Associate Chief Justice DURHAM's dissenting opinion.

APPENDIX B
RELEVANT STATUTORY PROVISIONS

1. United States Code Annotated Title 81 - 28 U.S.C. § 1257(a).

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

2. State Plans for Medical Assistance - 42 U.S.C. §1396a(a)(25)(A).

(A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers, group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C.A. § 1167(1)], service benefit plans, and health maintenance organizations) to pay for care and services available under the plan, including --
(I) the collection of sufficient information (as specified by the Secretary in regulations) to enable the State to pursue claims

against such third parties, with such information being collected at the time of any determination or redetermination of eligibility for medical assistance, and (ii) the submission to the Secretary of a plan (subject to approval by the Secretary) for pursuing claims against such third parties, which plan shall be integrated with, and be monitored as a part of the Secretary's review of the State's mechanized claims processing and information retrieval systems required under section 1396(r) of this title; (B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability;

3. Assignment, enforcement, and collection of rights of payments for medical care; establishment of procedures pursuant to State plan; amounts retained by State - 42 U.S.C. § 1396k(a)(1)(A)(b).

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall -- (1) provide that, as a condition of eligibility for medical assistant under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required -- (A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support

(specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party . . . .

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

4. Liens, adjustments and recoveries, and transfers of assets - 42 U.S.C. 1396p(a)(1).

(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan (1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except -- (A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or (B) in the case of the real property of an individual -- (I) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and (ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the

medical institution and to return home, except as provided in paragraph (2).

5. Treatment of trust amounts - 42 U.S.C. § 1396p(d)(4).

(4) This subsection shall not apply to any of the following trusts: (A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter. (B) A trust established in a State for the benefit of an individual if -- (I) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust), (ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter, and (iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title. (C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions: (I) The trust is established and managed by a nonprofit association. (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts. (iii) Accounts in the trust are established solely for

the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court. (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

6. Assignment of rights to benefits - Utah Code Ann. § 26-19-4.5.

(1) To the extent that medical assistance is actually provided to a recipient, all benefits for medical services or payments from a third party otherwise payable to or on behalf of a recipient are deemed to be assigned to the department if the department provides, or becomes obligated to provide, medical assistance. That assignment authorizes the department to submit its claim to the third party and authorizes payment of benefits directly to the department. The assignment is effective for services that are paid or to be paid by the department under the state plan, Section 26-18-10, and Title XIX of the federal Social Security Act. (2) The department may recover the assigned benefits or payments in accordance with Section 26-19-5 and as otherwise provided by law. (3) The assignment of benefits includes medical support and third party payments ordered, decreed, or adjudged by any court of this state or any other state or territory of the United States. That assignment is not in lieu of, and does not supersede or alter any other court order, decree, or judgment. (4) When an assignment takes effect, the recipient is entitled to receive medical assistance, and the

benefits paid to the department are a reimbursement to the department.

7. Recovery of medical assistance from third party liable for payment -- Lien -- Notice -- Action -- Compromise or waiver -- Recipient's right to action protected - Utah Code Ann. § 26-19-5(1)(a) & (b).

(1) When the department provides or becomes obligated to provide medical assistance to a recipient because of an injury, disease, or disability for which a third party is liable, the department may recover the medical assistance provided as a result of such an injury, disease, or disability shall be a lien against any proceeds payable to the recipient by that third party. This lien has priority over all other claims to the proceeds, except claims for attorney's fees and costs authorized under Subsection 26-19-7(4).

APPENDIX C

S.S., a minor, Plaintiff and Appellee,
v.
STATE of Utah and Office of Recovery Services, Defendant and Appellant.

No. 960430.

Supreme Court of Utah.

Nov. 27, 1998.

State sought repayment of state Medicaid benefits, from proceeds of third-party insurance settlement that recipient wished to use for special needs trust. The Third District Court, Salt Lake Department, Division I, Leslie A. Lewis, J., found for recipient. State appealed. The Supreme Court, Howe, C.J., held that: (1) third-party payments were effectively assigned to state; (2) state's lien attached to settlement proceeds; and (3) repayment of state's lien had priority over creation of special needs trust for Medicaid recipient.

Reversed and remanded.

Durham, Associate C.J., dissented and filed an opinion in which Stewart, J., concurred.

Lowell V. Smith, Richard K. Glauser, Salt Lake City, for plaintiff

Jan Graham, Att'y Gen., Linda Luinstra, Asst. Att'y Gen., Salt Lake City, for defendant

HOWE, Chief Justice:

The State of Utah appeals from the trial court's order that insurance payments for the injury which permanently disabled the minor plaintiff may be used to fund a "special needs trust" to be established to augment his long-term care without first reimbursing the State for Medicaid payment of plaintiff's nursing home care.

FACTS

Sixteen-year old S.S. suffered massive brain damage and was permanently disabled when a drunk driver crossed into oncoming traffic and struck the motorcycle upon which he and his eighteen-year-old brother were riding. S.S.'s parents are divorced; he was residing in Utah with his father, Richard S., at the time of the accident, although his mother had been awarded his custody.

A combination of private automobile, accident, and injury insurance plans contributed toward payment of S.S.'s medical costs, which totaled over $350,000. In addition, S.S.'s stepfather maintained a health insurance policy with Deseret Mutual Benefit Association ("DMBA"), which paid a substantial amount of medical expenses but provided no coverage for nursing home care.

S.S. was transferred from hospital care to nursing home care when his condition improved. Richard S. applied for and received Medicaid on S.S.'s behalf and, pursuant to statute,

executed an assignment of S.S.'s rights to any insurance recovery to the State. S.S.'s three older brothers, Douglas, Robert, and Michael S., were appointed conservators of his estate and petitioned the trial court for authorization to settle several insurance claims and to place the funds recovered in a special needs trust for S.S. The court approved settlement of $150,000 in insurance proceeds on February 29, 1996, and approved an additional $25,000 on August 26 of that year. The State asserted its statutory lien on part of the proceeds. The trial court held that (1) the State did not have a valid assignment because it had not been executed by the court-appointed conservators or by a legal guardian, (2) the State had not perfected its lien on the insurance proceeds, and (3) the insurance proceeds could be placed in the special needs trust without first reimbursing the State for nursing home costs paid by Medicaid which totaled $44,454.58. The court's decision was influenced by the absence of a requirement for pre-trust reimbursement in the "supplemental needs trust" ("SNT") [FN1] provisions of the United States Code, the Federal Regulations, and the Utah Code. The State appeals, assigning as error all three of the above trial court rulings.

FN1. Also referred to as a "special needs trust."

ANALYSIS

[1] This case presents only questions of law, which we review for correctness, granting no deference to the conclusions of the trial court. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

I. ASSIGNMENT OF BENEFITS

[2] The conservators contended in the trial court, and the court agreed, that the assignment of third-party payments made by Richard S. to Medicaid as a condition for receiving benefits was invalid because it was not made by S.S.'s mother, who had been awarded his custody, or by his court-appointed conservators. We begin with the plain wording of the relevant statutes.

> To the extent that medical assistance is actually provided to a recipient, all benefits for medical services or payments from a third party otherwise payable to or on behalf of a recipient are deemed to be assigned to the department if the department provides, or becomes obligated to provide, medical assistance. That assignment authorizes the department to submit its claim to the third party and authorizes payment of benefits directly to the department.

Utah Code Ann. § 26-19-4.5(1) (emphasis added). This statutory language would seem to indicate that without more, a recipient's acceptance of Medicaid payments operates to create an assignment. Additionally, however, in this case an assignment was made by the injured minor's father who is legally responsible for his son's medical expenses. Utah Code Ann. § 78-45-3(2)(a) provides that "[e]xcept as limited in a court order...[t]he expenses incurred on behalf of a minor child for reasonable and necessary medical and dental expenses, and other necessities are chargeable upon the property of both parents, regardless of the marital status of the parents." Thus there was a valid assignment of the insurance recovery.

II. PERFECTION OF LIEN

Conservators further complained in the trial court that the State had not perfected its lien on the insurance proceeds because it had not submitted evidence of compliance with Utah Code Ann. § 26-19-5. Under that section, the State's claim to recover medical assistance is a lien against proceeds payable to the recipient by liable third parties. Subject to certain conditions, the State may maintain an action on its lien directly against the third party. That section provides that

> The department shall mail or deliver written notice of its lien to the third party at its principal place of business or last known address. The notice shall include the recipient's name, the approximate date of injury, a general description of the type of injury and, if applicable, the general location where the injury is alleged to have occurred.

Utah Code Ann. § 26-19-5(2). This section further provides:

> (3) The department may commence an action on its lien in its own name [;] however, that lien is not enforceable as to a third party unless:
> (a) the third party receives written notice of the department's lien before it settles with the recipient; or
> (b) the department has evidence that the third party had knowledge that the department

> provided or was obligated to provide medical assistance.

Id. § 26-19-5(3). The obvious purpose of this section is to protect a third party who is unaware of the State's lien and settles with the recipient. That, of course, did not happen here because the State has not brought an action against any third party but has, instead, challenged the disposition of insurance funds that are subject to court approval, making notice to any third party irrelevant.

Additionally, section 26-19-7(1)(a) provides that a recipient "may not file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an injury, disease, or disability for which the department has provided ... medical assistance without the department's written consent." This provision protects both the liable third party and the State from ill-informed or devious action by the recipient.

In the instant case, the conservators assigned certain insurance benefits to DMBA and also sought to settle with several other insurers without the permission of the State. In such an instance,

> the department is not bound by any decision, judgment, agreement, or compromise rendered or made on the claim or in the action. The department may recover in full from the recipient all medical assistance which it has provided and retains its right to commence an independent action against the third party.

Utah Code Ann. § 26-19-7(2) (emphasis added). Furthermore, the department has an "unconditional right to intervene in an action commenced by a recipient for recovery of medical costs connected with the same injury, disease, or disability, for which it has provided or has become obligated to provide medical assistance." Id. § 26-19-7(1)(b). Therefore, regardless of whether the State has a valid lien, the recipient's preemptive action does not cost the State its right to third-party payments which are in settlement or are already in the hands of the beneficiary. The court of appeals recognized this in Estate of Higley, 810 P.2d 436 (Utah Ct.App. 1991), and Camp v. Office of Recovery Services, 779 P.2d 242 (Utah Ct.App.1989), both holding that where the recipient had settled insurance claims without the State's consent, the State could recover full reimbursement from the recipient of its outlay for medical expenses.

[3] The conservators further contended in the trial court, and the court agreed, that any lien the State might have is illegal under 42 U.S.C. § 1396p(a), which provides that "[n]o lien may be imposed against the property of an individual prior to his death on account of medical assistance paid or to be paid on his behalf under the state plan." The New York Court of Appeals recently addressed this issue in the consolidated appeals of Cricchio v. Pennisi and Link v. Town of Smithtown, 90 N.Y.2d 296, 683 N.E.2d 301, 660 N.Y.S.2d 679 (1997). There, the court stated that as a consequence of the mandatory assignment

> the settlement proceeds are resources of the third party tortfeasor that are owed to [the state recovery office]. Accordingly, the lien on the settlement proceeds attaches to the

> property of the third party, and thus does not violate the statutory prohibition against imposing a lien against a beneficiary's property until after his or her death. The flaw in plaintiff's theory that the lien cannot be satisfied until the recipient's death is that it fails to appreciate this critical distinction between the assets of a responsible third party and assets belonging to the Medicaid recipient.

660 N.Y.S.2d 679, 683 N.E.2d at 305 (citations omitted). We agree. Payments made by a third party do not legally become the property of the recipient until after a valid settlement, which necessarily must include reimbursement to Medicaid. Therefore, we hold that the State has a valid assignment and an enforceable right against third-party recoveries for S.S.'s injury up to the amount of Medicaid assistance paid as of the time of the settlement approval.

III. REIMBURSEMENT OF MEDICARE AND FUNDING OF THE SUPPLEMENTAL NEEDS TRUST

[4] Under the provisions of 42 U.S.C. § 1396p(d)(4)(A) and Utah Code Ann. § 62A-5-110, a properly drafted discretionary trust, often referred to as a special needs or supplemental needs trust, may provide resources to a disabled person under sixty-five years of age for care beyond that which Medicaid supplies without defeating the recipient's Medicaid eligibility. By means of such a trust, the sufferer of a long-term disability may enjoy education, rehabilitation, transportation, and other advantages which Medicaid does

not cover without losing Medicaid's basic medical benefits. Congress enacted the supplemental needs trust provision as an explicit exception to the general trend of the Omnibus Budget Reconciliation Act ("OBRA") of 1993, which attempted to close loopholes that allowed wealthy elders to reap Medicaid benefits while still retaining their personal wealth and passing it on to the next generation. See generally Stewart Weisner, OBRA '93 and Medicaid: Asset Transfers, Trust Availability and Estate Recovery Statutory Analysis in Context, 19 Nova L.Rev. 679 (1995).

The supplemental needs trust must be structured so that "upon the death of the beneficiary, the state will receive all amounts remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the beneficiary." Utah Code Ann. § 62A-5-110(1)(a)(vi). The conservators contend that this provision supersedes sections 26-19-5 and -7, which provide for reimbursement to the State when there has been an insurance recovery such as happened here. Thus the conservators argue that the State is not now entitled to reimbursement, but only after S.S.'s death. The State responds that Medicaid is designed to be the payor of last resort and the establishment of a supplemental needs trust does not change the fact that the mandatory assignment of benefits gives the State a lien on any third-party recovery to the extent of the State's expenditures. The State bolsters its argument with reference to 42 U.S.C. § 1396 (1993), under which the states are required to collect reimbursement for Medicaid assistance from liable third parties. Therefore, the State insists that S.S.'s insurance recoveries may be used to fund a supplemental needs trust only after the State has been reimbursed.

[5][6] The trial court noted that "the specific provisions of the United States Code, the Federal regulations and State laws pertaining to supplemental needs trusts do not require reimbursement of pre-settlement assistance benefits from petitioners to the State of Utah." However, the Utah reimbursement provisions are found in the earlier enacted sections 26-19-5 and -7, and the legislature's failure to explicitly reaffirm an earlier statute when it later enacted section 62A-5-110 does not give rise to a presumption of preemption. Rather, a recently enacted statute will supersede an existing statute only in the instance of an irreconcilable conflict between the two.

> Though it is true ... that subsequently enacted statutes generally supersede prior existing ones on the same subject, statutes are not repealed by implication. Even when they seem to overlap in some areas, they should be so construed to give effect to both if possible; and the later statute neither supersedes nor repeals the prior one unless its terms are irreconcilable with the former statute.

Pride Club v. Miller, 572 P.2d 385, 387 (Utah 1977) (citing McCoy v. Severson, 118 Utah 502, 222 P.2d 1058 (1950)). Likewise, a federal statute will preempt a state statute only in the case of an actual conflict unless the federal statute has been shown to preemptively occupy the field, which has not occurred here. We find no irreconcilable conflict here either on the federal or state level, or between the two, because the Medicaid recovery statutes deal with reimbursement, while the discretionary trust statutes address Medicaid eligibility. Thus we may conclude, without doing violence to either

statute, that recoveries from third parties liable for the same expenses covered by Medicaid belong to the State, but any remaining balance not owed to the State may be used to fund a properly structured supplemental needs trust. Such a trust will permissibly expand the resources available for the disabled person's care beyond that which the Medicaid eligibility provisions would ordinarily allow without defeating eligibility. In the words of the Cricchio court:

> [T]here is no indication that the amendments were designed to alter the legal liability of any responsible third party to reimburse Medicaid for care, which is a cornerstone of the Medicaid program. Rather, the legislative history of the Acts authorizing the creation and favorable treatment of assets held in an SNT reveals that the amendments were prompted by the sole desire to encourage families to undertake long-term financial planning for loved-ones with family assets that were not otherwise earmarked "to reimburse government assistance."

Cricchio, 660 N.Y.S.2d 679, 683 N.E.2d at 305 (citing Bill Jacket, L.1993 c. 433, Mem. in Support.) [FN2] We therefore hold that repayment of the Medicaid lien from third party settlement funds must precede creation of the supplemental needs trust.

> FN2. "[S]upplemental needs trusts would be created with 'funds the State would not obtain to reimburse itself for public assistance in any event.'" Id.

IV. OFFSET AND CREDIT

Finally, the conservators assert that if reimbursement to the State is required, they should be entitled to a partial offset equal to the State's proportionate share of attorney fees and costs. They also contend that they are entitled to a credit for certain support payments made by Richard S. to the State. Since the trial court denied any recovery by the State, these issues were not reached and ruled upon by that court. The conservators are free to raise them on remand.

CONCLUSION

We conclude that the insurance benefits were effectively assigned and that repayment of previous Medicaid expenditures takes priority over the use of the insurance benefits to establish a supplemental needs trust. Therefore, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Justice ZIMMERMAN and Justice RUSSON concur in Chief Justice HOWE's opinion.

DURHAM, Justice, dissenting:

The majority holds that the State may enforce a statutory lien for past Medicaid benefits on settlement proceeds designated (by court order) for a supplemental needs trust created pursuant to section 62A-5-109(2). I respectfully dissent; that result is contrary to both federal and state law.

Both Congress and the Utah Legislature have enacted provisions explicitly authorizing the sheltering of assets to be

used for the care of disabled individuals from execution by the State for past, present, or future Medicaid benefits until after the death of the disabled individual. Those provisions, detailed hereafter, were enacted subsequent to, and separately from, the general provisions contained in OBRA '93 and Utah's Medical Benefits Recovery Act. The explicit protections designed for these sources of support for disabled persons supersede and take precedence over the generic collection schemes otherwise applicable to Medicaid reimbursements. All of the third-party reimbursement provisions on which the State relies in this case are part of the general collection scheme to which the supplemental need trusts provisions are a later, and explicit, exception.

The majority finds "no irreconcilable conflict" between the general reimbursement statutes and the subsequently enacted exceptions for supplemental needs trust because "the Medicaid recovery statutes deal with reimbursement, while the discretionary trust statutes address Medicaid eligibility." This assertion is not entirely accurate, and certainly not dispositive. The federal exemption language appears in 42 U.S.C. § 1396p(d)(4). Subsection (d) does indeed refer to determining an individual's eligibility for benefits. But subsection (d) is itself a subsection of section 1396p, entitled "Liens, adjustments and recoveries, and transfers of assets." It has five subsections: "(a) Imposition of lien against property of individual on account of medical assistance rendered to him under State plan ...; (b) Adjustment or recovery of medical assistance correctly paid under State plan ...; (c) Taking into account certain transfers of assets ...; (d) Treatment of trust amounts ...; and (e) Definitions." The lien restrictions specified in subsection (a) clearly apply to all of the subsequent paragraphs, some of which also deal with

eligibility requirements, but all of which deal with property to which the state can properly look for reimbursement of medical assistance amounts paid or to be paid.

In reading section 1396p in its entirety, it is plain that the entire section was designed by Congress to ensure protection of certain types of property in certain circumstances from attachment by the state during the lifetimes of disabled individuals. The lien prohibitions in subsection (a) are as applicable to subsections (b), (c), and (d) as are the definitions in subsection (e). Critically, those definitions specifically describe the type of assets at issue in this case--settlement proceeds. For section 1396p purposes,

> (1) The term "assets", with respect to an individual, includes all income and resources of the individual ..., including any income or resources which the individual is entitled to but does not receive because of action... .
> (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual... .

Id. § 1369p(e)(1). The settlement proceeds in this case have been ordered by the district court to be placed in a supplemental needs trust established by the properly appointed guardians of S.S. Congress intended such funds to be exempt from attachment during S.S.'s lifetime.

Likewise, it is not the case, as suggested by the majority, that the state statute governing supplemental needs trusts is limited to "eligibility" considerations. Section 62A-5-110 specifically states:

> (3) A discretionary trust for a person with disabilities is not liable for reimbursement or payment to the state or any state agency, for financial aid or services provided to that individual....
> (4) Property, goods and services that are purchased or owned by a discretionary trust for a person with disabilities and that are used or consumed by a disabled beneficiary shall not be considered trust property that is distributed to or under the control of the beneficiary.
> (5) The benefits that a person with disabilities is otherwise legally entitled to may not be reduced, impaired, or diminished in any way because of contribution to a discretionary trust for that person.

Utah Code Ann. § 62A-5-110(3), (4), & (5) (emphasis added). Only subsection (6) of section 62A-5-110 speaks to eligibility. The foregoing provisions, read cumulatively as they must be, reveal an expansive view of the property to be shielded from any form of lifetime attachment by the State for medical assistance.

The discretionary trust in question in this case was properly created, and the transfer of settlement proceeds duly ordered by the district court. There is no question of S.S.'s eligibility as a beneficiary of such a trust, nor of the propriety of placing personal injury settlement funds in it. There is also, in my view, no question of the intent of the federal provisions and the parallel state statutes to shield whatever assets are property placed in that trust from reimbursement liens by the

State during S.S.'s lifetime. The third-party recovery scheme relied on by the state here is part of the overarching scheme for recovery of medical assistance payments paid in the ordinary case. The supplemental needs of trusts provisions are and were intended to be an explicit, specific, and narrow exception available to persons who are totally disabled--the extraordinary case. It would have been a relatively easy matter for Congress or the legislature to specify that the recovery exemptions in 42 U.S.C. § 1396p(d) and Utah Code Ann. § 62A-5-110 did not include exemption from the third-party recovery provisions in 42 U.S.C. § 1382 and Utah Code Ann. § 26-19-5. Instead, the exemptions in both the federal and state statutes are blanket exceptions covering all forms of reimbursement, diminution of benefits, liens, or any other process designed to accomplish collection. Once S.S.'s recovery from the persons liable for his injuries was contributed to a properly created supplemental needs trust, the State had no power to attach it until his death, just as is true of any other funds contributed to that trust. The majority agrees with the analysis of the New York Court of Appeals in Cricchio v. Pennisi, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301, 305 (N.Y.1997), that "there is no indication that the amendments [creating supplemental needs trusts] were designed to alter" the third-party reimbursement provisions. I think there is ample indication that the amendments were intended to shelter supplemental needs trust funds from all of the repayment, reimbursement, and mandatory assignment provisions contained in the earlier statute.

I would therefore affirm the district court.

Justice STEWART concurs in Associate Chief Justice DURHAM's dissenting opinion.